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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY NEAL YORK,

Defendant and Appellant.

C079954

(Super. Ct. No. 14F06426)

Defendant Larry Neal York was convicted of various charges related to driving under the influence of alcohol (DUI). On appeal, he challenges his convictions on three of these four counts, claiming they were lesser included offenses of his conviction for driving with a blood-alcohol content (BAC) of 0.08 percent or higher and causing injury. (Veh. Code, § 23153, subd. (b).)¹ He also challenges the trial court's imposition of great

¹ Further undesignated statutory references are to the Vehicle Code.

bodily injury enhancements (Pen. Code, § 12022.7), claiming those enhancements are preempted by Vehicle Code section 23558.

The People agree that two of the DUI charges are lesser included offenses of the other two and should be reversed, and add that the trial court erred in failing to impose two section 23558 enhancements for causing injury to multiple victims. We reverse the two lesser included DUI offenses and remand for sentencing on the section 23558 enhancements. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

While under the influence of alcohol, defendant drove above the speed limit through a crosswalk and collided with Armando Soria, who was on horseback with fellow riders, including Pablo Macias. Soria was knocked off his horse and fell to the ground, unconscious. The impact spun Soria's horse, causing it to hit Macias' horse and fly over the top of defendant's car, shattering defendant's windshield. Macias was knocked off his horse and thrown to the ground.

When the police arrived, defendant told them he did not see the horses or any pedestrians on the street. Breath tests performed at the scene of the accident revealed BACs of 0.159 and 0.175 percent. Blood samples taken two hours after the accident revealed a BAC of 0.19 percent.

As a result of the collision, Macias suffered a broken leg, back pain, and injured elbows. Soria required surgery for a broken arm and also suffered a split forehead, back pain, a swollen eye, and a broken tooth.

Before jury trial began, defendant pleaded no contest to driving with a suspended license. (Count five; § 14601.2, subd. (a).) A jury found defendant guilty of: DUI and causing bodily injury (count one; § 23153, subd. (a)); driving with a BAC of 0.08 percent or higher and causing bodily injury (count two; § 23153, subd. (b)); DUI (count three; § 23152, subd. (a)); and driving with a BAC of 0.08 percent or higher (count four; § 23152, subd. (b)). With respect to counts one through four, the jury also found true

allegations defendant personally inflicted great bodily injury (GBI) upon Macias and Soria. (Pen. Code, § 12022.7, subd. (a).) With respect to counts one and two, the jury also found true an allegation defendant proximately caused bodily injury to more than one victim (Macias and Soria) in one instance of driving. (§§ 23153, subds. (a) & (b), 23558.) With respect to the prior DUI convictions alleged as to counts one through four, defendant waived a jury trial and the trial court subsequently found true that defendant suffered three prior DUI-related convictions within the past 10 years. (§ 23550.)

The trial court sentenced defendant to an aggregate term of nine years in prison as follows: count one, three years (the mid-term) plus two 3-year GBI enhancements; count two, three years plus two 3-year GBI enhancements, all stayed; count three, two years (the mid-term) plus two 3-year GBI enhancements, all stayed; count four, two years plus two 3-year GBI enhancements, all stayed; and count five, a stayed six-month county jail term. The trial court did not impose the multiple victim enhancements pursuant to section 23558.

DISCUSSION

I

Lesser Included Offenses

Defendant contends his convictions for DUI causing injury (count one), DUI (count two), and driving with a BAC of 0.08 percent or higher (count four) must be reversed because they are lesser included offenses of his conviction for driving with a BAC of 0.08 percent or higher causing injury (count three). The People agree that count three is a lesser included offense of count one and count four is a lesser included offense of count two.

We agree with the parties that count three is a lesser included offense of count one, because DUI is a lesser included offense of DUI causing injury. We also agree with the parties that count four is a lesser included offense of count two, because driving with a BAC of 0.08 percent or higher is a lesser offense of driving with a BAC of 0.08 percent

or higher causing injury. However, defendant's conviction for count one was proper, because DUI is not a lesser included offense of driving with a BAC of .08 percent or above.

“When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed.” (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) In determining whether multiple conviction is proper, a court should consider “only the statutory elements.” (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.) Per the elements test, “if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.” (*Id.* at p. 1227.) Accordingly, “ ‘[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ ” (*Ibid.*)

A. Subdivisions (a) and (b) of Section 23152

Sections 23152, subdivision (a) and 23153, subdivision (a) both prohibit individuals from driving while under the influence, and both sections 23152, subdivision (b) and 23153, subdivision (b) prohibit individuals from driving with a 0.08 percent or more blood-alcohol level. In addition to those requirements, to violate section 23153, subdivisions (a) or (b), a defendant must *also* “concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.” (*Id.*, subs. (a) & (b).) Because a defendant cannot violate subdivision (a) of section 23153 without also violating subdivision (a) of section 23152, section 23152, subdivision (a) is a lesser included offense within section 23153, subdivision (a), and the same is true for sections 23152, subdivision (b) and 23153, subdivision (b). (See *People v. Subramani* (1985) 173 Cal.App.3d 1106, 1111 [section 23153 is a counterpart of section 23152, with section

23153 containing additional elements, including bodily injury or death]; see also *People v. Reed, supra*, 38 Cal.4th at p. 1227.) Defendant’s convictions on counts three and four must be reversed.

B. Section 23153, Subdivisions (a) and (b)

“[T]he offenses proscribed in subdivisions (a) and (b) of section 23153 are separate from each other and neither is a lesser included offense of the other.” (*People v. Subramani, supra*, 173 Cal.App.3d at p. 1111; see also *People v. Toure* (2015) 232 Cal.App.4th 1096, 1106.) The two involve different elements of proof, namely whether a defendant is driving with a “0.08 or more blood-alcohol” or “under the influence.” (§ 23153, subs. (b), (a).) As such, a defendant “may be properly convicted of both.” (*Toure*, at p. 1106.) Defendant was properly convicted for both types of DUI and was properly punished for only one conviction. (See *Subramani*, at p. 1111.)

II

Great Bodily Injury Enhancements

Defendant next contends section 23558 preempted the imposition of the GBI enhancements under Penal Code section 12022.7, subdivision (a). We disagree.

“ ‘The preemption doctrine provides that a prosecution under a general criminal statute with a greater punishment is prohibited if the Legislature enacted a specific statute covering the same conduct *and intended* that the specific statute would apply exclusively to the charged conduct. [Citations.]’ ” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1326 (*Weaver*), overruled on other grounds in *People v. Cook* (2015) 60 Cal.4th 922.) This special over general rule applies in the context of enhancement statutes. (*Weaver*, at p. 1326.) The special enhancement only preempts the general enhancement if (1) “ ‘ “each element of the ‘general’ statute corresponds to an element on the face of the ‘specific’ [sic] statute” ’ or (2) “ ‘it appears from the entire context that a violation of the ‘special’ statute will necessarily or commonly result in a violation of the ‘general’ statute.” [Citations.]’ ” (*Id.* at pp. 1326-1327.) Even if either of these two alternative

tests is satisfied, “the special statute will *not* be applied under the preemption doctrine if the Legislature intended the general statute to apply.” (*Id.* at p. 1327.)

Penal Code section 12022.7 imposes a three-year enhancement on “[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony” Vehicle Code section 23558 imposes a one-year enhancement for each additional injury victim on a “person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code”

Courts have repeatedly held that Vehicle Code section 23558 (and its predecessor section 23182)² does not preempt Penal Code section 12022.7, and we decline defendant’s invitation to reject this established case law. (*Weaver, supra*, 149 Cal.App.4th at pp. 1327-1328; *People v. Arndt* (1999) 76 Cal.App.4th 387, 394.) The first alternative test is not met because the elements of Penal Code section 12022.7, subdivision (a), which requires *great* bodily injury, do not correspond to section 23558, which may be imposed based on mere bodily injury. (See *Arndt*, at p. 393 [reasoning that “great bodily injury” and “bodily injury” have different meanings].)

The second alternative test is not met because “section 23558 can apply when the defendant drives while intoxicated and only *proximately* causes *bodily* injury,” making it impossible to conclude “section 23558 will *commonly* result in a violation of section 12022.7, subdivision (a), which statute requires *personal* infliction of *great bodily* injury.” (*Weaver, supra*, 149 Cal.App.4th at pp. 1327-1328.) In addition, like the *Weaver* court, we do not find empirical evidence in the record “proving that driving while intoxicated and proximately causing bodily injury also commonly results in personal infliction of great bodily injury.” (*Id.* at p. 1328.)

² Section 23182 was recodified as section 23558. (Stats. 1998, ch. 118, §§ 45, 84.)

Moreover, the legislative intent of section 12022.7, subdivision (a) “shows its greater three-year enhancement was intended to apply despite the potential availability of lesser enhancements.” (*Weaver, supra*, 149 Cal.App.4th at p. 1328.) As the court noted in *Weaver*, the plain language of section 12022.7 “ ‘indicates the Legislature intended it to be applied broadly.’ ” (*Weaver*, at p. 1328.) Further, the purpose of section 23558 “is to *increase* the potential punishment available in certain cases where an alcohol[-] or drug-impaired individual operating a vehicle or watercraft causes an accident which results in multiple injuries, *not to limit the use of another otherwise applicable enhancement.*” (*People v. Arndt, supra*, 76 Cal.App.4th at p. 394, italics added.)

III

Imposition of Section 23558 Enhancements

The People contend the trial court erred in failing to impose sentence for the section 23558 enhancements. They argue that when, as here, a defendant is found to have proximately caused bodily injury to two victims in one instance of driving under section 23558, the trial court must impose two 1-year enhancements unless “it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.” (*Ibid.*)

We agree that “a trial court’s failure either (1) to pronounce sentence on a statutory sentence-enhancement allegation based upon a finding by the trier of fact or an admission by the defendant that the allegation is true, or (2) to exercise its discretion--to the extent imposition of the enhancement is discretionary--to either strike the enhancement allegation or impose the enhancement, results in an unauthorized sentence.” (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 432; see also *People v. Bradley* (1998) 64 Cal.App.4th 386, 391 [the “failure to impose or strike an enhancement is a legally unauthorized sentence”].)

In *Bradley*, for example, a jury found defendant had served four prior prison terms but the trial court only imposed three of the four enhancements. (*People v. Bradley, supra*, 64 Cal.App.4th at p. 390; Pen. Code, § 667.5, subd. (b).) Although the trial court had discretion to *strike* the enhancements, the court did not explicitly do so and did not provide the statutorily required statement of mitigating reasons. (*Bradley*, at p. 390.) Such a “refusal to sentence” was unauthorized and the *Bradley* court remanded the matter for resentencing, directing the trial court to either impose or strike the prior prison term enhancement. (*Id.* at pp. 391-392, 401.)

Similar to *Bradley*, here the jury found the section 23558 enhancements true on counts one and two but the trial court failed to impose them. Nor did the court explicitly strike the enhancements or state on the record any mitigating reasons for striking them. Because the resulting sentence is unauthorized, we must remand for resentencing on this limited issue. Because the trial court has not yet decided whether to impose sentence on the enhancements, we decline to reach defendant’s contention that Penal Code section 654 applies to stay both enhancements. That issue is not yet ripe.

DISPOSITION

The convictions on counts three and four are reversed, and the trial court is directed to dismiss them. The matter is remanded to the trial court for sentencing on the section 23558 enhancements. In all other respects, the judgment is affirmed.

 /s/
Duarte, J.

We concur:

 /s/
Blease, Acting P. J.

 /s/
Murray, J.